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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-1023

HENRY W. KERR, et al., *Petitioners*,

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent*,

JOHN VAN GELDERN, et al., *Real Parties in Interest*.

PETITION FOR WRITS OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit
~~**and to the United States District Court for the Northern District of California**~~

~~**AND**~~

~~**MOTION FOR LEAVE TO FILE**~~

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No.

HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*

JOHN VAN GELDERN, et al., *Real Parties in Interest.*

MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF CERTIORARI

Petitioners respectfully move this Court for leave to file the annexed petition for writs of certiorari under Title 28 United States Code Section 1651, directed to the United States District Court for the Northern District of California, to review orders of that court entered on June 20, 1974 and on December 3, 1974, and more particularly described in the petition, and for such other and further relief as may be just and proper.

This motion is made in conjunction with a petition for writs of certiorari under Title 28, United States

Code section 1254(1), to review orders of the United States Court of Appeals for the Ninth Circuit, entered on December 18, 1974, and January 17, 1975, in the same proceedings.

Dated, February 14, 1975.

EVELLE J. YOUNGER,
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UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*
JOHN VAN GELDERN, et al., *Real Parties in Interest.*

PETITION FOR WRITS OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit and to the United States District Court for the Northern District of California

---

Petitioners, Henry W. Kerr, et al.,[1] respectfully pray that writs of certiorari issue to review the decisions of the United States Court of Appeals for the

[1]Petitioners are the defendants below named in the complaint as follows: "Henry W. Kerr, Curtis O. Lynum, Manley J. Bowler, Leland M. Edman, James H. Hoover, Charles E. Brown, Daniel R. Lopez, individually and in their official capacity as members of the California Adult Authority, Joseph A. Spangler, individually and in his official capacity as Administrative Officer of the California Adult Authority, Raymond K. Procunier, individually and in his official capacity as Director of Corrections of the State of California, their agents, employees and successors in interest, Defendants."

Ninth Circuit denying petitioners' petitions for writs of mandamus, entered on December 18, 1974 and on January 17, 1975, and to review the underlying orders of the United States District Court for the Northern District of California, entered on June 20, 1974 and on December 3, 1974, which gave rise to the mandamus proceedings. By reason of these orders, petitioners must produce for adversary inspection the confidential contents of the personnel files of members and hearing representatives of the California Adult Authority (the state parole board), and of the correctional files of any 200 California state prisoners designated by plaintiffs, and specified other categories of confidential state government documents.

The two district court orders were entered by the same judge in the same action, and both compel the discovery of confidential state government documents. The two Court of Appeals decisions were rendered on petitioners' attempts to obtain interlocutory review of the discovery orders. Pursuant to Rule 23(5), Supreme Court Rules, this single petition for writs of certiorari is submitted to seek review of the two decisions of the Court of Appeals and of the two discovery orders of the district court.

OPINIONS BELOW

The opinion of the Court of Appeals dated January 17, 1975 has not yet been reported. A copy of this opinion is annexed as Exhibit A of the Appendix to this petition. The underlying discovery order of the

district court, dated June 20, 1974, as well as the magistrate's findings and recommendations, dated April 24, 1974, which are incorporated by reference in the district court's order, are annexed as Exhibit B of the Appendix to this petition.

The order of the Court of Appeals dated December 18, 1974, has not been reported. A copy of this order is annexed as Exhibit C of the Appendix. A copy of the underlying discovery order of the district court, dated December 3, 1974, is annexed in Exhibit D of the Appendix to this petition. This order incorporates an earlier discovery order, dated August 12, 1974, and magistrate's findings and recommendations dated June 11, 1974. Both of these documents are also annexed in Exhibit D of the Appendix to this petition.

JURISDICTION TO REVIEW

The decisions of the Court of Appeals sought to be reviewed were entered December 18, 1974, (No. 74-3392) and on January 17, 1975 (No. 74-2206) and each denied petitioners' petitions for writ of mandamus and/or prohibition to review discovery orders entered by the district court in the same action on December 3, 1974 and on June 20, 1974. This Court's jurisdiction to review these decisions of the Court of Appeals is invoked under Title 28 United States Code section 1254(1).

The underlying discovery orders of the district court sought to be reviewed were entered on December 3, 1974, and on June 20, 1974. The jurisdiction of this

Court to review directly these orders of the district court is invoked under Title 28 United States Code section 1651.

The special and unusual circumstances which warrant exercise by this Court of its discretionary power to issue the common law writs of certiorari, as requested in this petition, as well as reasons why the relief is not available in any other court, are set forth later under the heading "Reasons For Granting The Writs."

QUESTIONS PRESENTED

1. Whether Rule 26(b) (1), Federal Rules of Civil Procedure, extends to confidential state government documents a qualified privilege of non-disclosure whereby their production for adversary inspection may be compelled only after the district court has looked at them and decided their utility in the pending action outweighs their confidentiality.

2. Whether such a qualified privilege may be asserted by the attorney general on behalf of his client who is a defendant and head of the department which controls the state government documents where (a) the confidential nature of the documents is apparent; (b) the utility of the documents in the pending action is not apparent, and (c) there is an abundance of alternative sources of information adequate to pursue the points for which the confidential documents are sought.

3. Whether the compelled disclosure of confidential government documents for adversary inspection under

the protective orders in this case, or under any protective order, is a permissible substitute for a qualified privilege of non-disclosure under Rule 26(b) (1) Federal Rules of Civil Procedure.

4. According to what standard should the Court of Appeals exercise discretion under Title 28 United States Code section 1651 to review interlocutory discovery orders?

5. Whether the completed production of a confidential document for adversary inspection under a court order not supported by a showing and objective determination that there is probable cause to believe the utility of the document in a pending action outweighs its confidentiality is an unreasonable search or seizure in violation of the Fourth Amendment to the United States Constitution.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 26(b)(1):

> "Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things

and the identity and location of persons having knowledge of any discoverable manner. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

United States Code, Title 28 section 1651(a):

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

STATEMENT OF THE CASE

A. Nature of the Action Below.

This is a civil rights class action on behalf of all adult male felons in prison or on parole, for declaratory and mandatory injunctive relief to determine what process is due at state parole and disciplinary proceedings.[2]

[2]The complaint asserts that due process requires the following rights be furnished at all proceedings on considering, rescinding, or revoking parole; at term fixing or re-fixing proceedings, and at serious disciplinary proceedings: (1) the right to counsel, appointed if necessary; (2) the right to present favorable witnesses; (3) the right to confront and cross-examine adverse witnesses; (4) the right to discovery of evidence which may be considered at the hearings; (5) the right to challenge panel members for bias; (6) the right to a verbatim record of the proceeding; (7) the right to a written decision including a statement of the reasons for decision and of the evidence relied on.

The requirements of due process at parole revocation and disciplinary proceedings have already been established by this Court. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Wolff v. McDonald*, ___ U.S. ___, 94 Sup. Ct. Rptr. 2963, 41 L. Ed. 2d 935 (1974). At parole rescission hearings, California state prisoners are entitled to the due process standards set forth in *Morrisey. In re Prewitt*, 8 Cal. 3d 470, 503 P. 2d 1326 (1972). Whether the right to counsel under *Scarpelli* also applies to California parole rescission proceedings has been briefed, argued, and submitted to the California Supreme Court in *Gee v. Brown*, No. SAC. 7994.

For parole consideration proceedings, a California state prisoner has the right to notice, to examine the contents of his correctional file, to appear and be heard, and to written reasons for any denial of parole. *In re Olson*, 37 Cal.App.3d 783, 12 Cal.Rptr. 579 (1974); *In re Sturm*, 11 Cal.3d 258, 521 P.2d 97 (1974). Term-fixing generally attends parole consideration proceedings, and term-refixing generally attends parole revocation proceedings.

From the above, it would appear that the only "open" questions in the action concern plaintiffs' demands for rights to counsel and to call and confront witnesses at parole consideration proceedings, and their demands for rights to challenge for bias and to a verbatim record at all the indicated proceedings. The resolution of these questions of law would neither require nor justify the compelled indiscriminate production of the confidential documents sought by plaintiffs.

Despite the breadth of allegations in the complaint, the action has focused on parole consideration proceedings, and counsel for plaintiffs have focused their discovery on such proceedings.

The complaint was filed on November 15, 1972. No monetary relief is demanded by plaintiffs, and respective counsel have agreed that this is a non-jury case and that no jury has been demanded.

The commencement of trial is presently calendared for June 9, 1975.

B. Proceedings Relating to the Discovery Orders Sought to be Reviewed.

1. *The contents of immate files* (U.S.D.C. Order of December 3, 1974; Court of Appeals Order denying mandamus in action 74-3392 on December 18, 1974).

Pursuant to Rule 34, Federal Rules of Civil Procedure, plaintiffs requested that defendants produce the correctional files of every twentieth inmate (over 1000 files). Upon defendants' objection (on grounds of confidentiality, and Fourth Amendment grounds) and plaintiffs' motion to compel, the magistrate recommended that the files of up to 200 inmates be produced under a protective order limiting inspection to plaintiffs' counsel, and use only in connection with this case. (Appendix, Exhibit D). By order dated August 12, 1974, the district court affirmed the magistrate with an addition to the protective order to require that inmates consent to inspection of their files.

In September 1974, defendants produced the correctional files of the inmates first designated by plaintiffs (22 inmates). In doing so, however, certain confidential documents were withheld from the files as a preliminary matter. These documents included reports from confidential informers, crime partner information, sensitive clinical data, investigative reports accompanying certain visitor requests, and confidential communications from judges and district attorneys. Each document withheld was identified in writing as was the reason for withholding it, and plaintiffs' counsel was furnished the writing.

The inmate files furnished were inspected by counsel for plaintiffs on October 9, 11, and 15, 1974. By letter dated October 15, 1974, counsel for defendants advised counsel for plaintiffs that if they wished to inspect any of the confidential documents withheld, they should express some specific need for them in the pending action, whereupon the confidentiality of the documents would be re-evaluated in the light of such need. This letter sought negotiations between counsel and then, if necessary, presentation of the documents to the district court for an *in-camera* inspection and balancing of the interests in confidentiality against plaintiffs' need for the documents in the action.

Plaintiffs rejected this suggestion and filed on October 19, 1974, a motion for "Enforcement, Clarification, and Sanctions," which asserted that defendants violated the district court's order by not furnishing the confidential documents, and requested an order that the inmate files be furnished intact, that plaintiffs be allowed to make photocopies of any and all of the contents of these files, and that the inspection not be limited to the files of inmates whose parole consideration proceedings had been recorded.

When the matter was heard on October 31, 1974, the court made it clear that the preliminary withholding of the documents was a violation of the discovery order and threatened defendants, and counsel for defendants, with contempt proceedings if this or any other violation of an order occurred. The court announced that a forthcoming written order would provide that (1)

the inmate files subject to inspection include the files of inmates whose parole consideration proceedings were not recorded; (2) the contents of the files to be produced for inspection must include *all* material in the file; (3) plaintiffs could move for modification of the Order of August 12, 1974, to permit photocopying, and (4) plaintiffs' counsel could have the assistance of two certified law students in inspecting the files.

Plaintiffs then filed a motion for photocopying the contents of the inmate files, defendants filed opposition, and the matter was heard on November 21, 1974, whereupon the district court dictated in open court the text of the order to which this petition is addressed. The written order was signed on December 3, 1974, and is annexed in Exhibit D of the Appendix to this petition. This order reflects the court's determinations of October 31, 1974, and November 21, 1974, and incorporates by reference the order of August 12, 1974.

On December 13, 1974, defendants filed in the United States Court of Appeals for the Ninth Circuit a petition for writ of mandamus and/or prohibition, an application for stay of the discovery order and an application for immediate stay. The immediate stay was granted on December 13, 1974. On December 18, 1974, the Court of Appeals issued its order denying the petition for writ of mandamus and vacating the immediate stay. A copy of this order is annexed in Exhibit C of the Appendix to this petition.

2. *The contents of personnel files and of other specified categories of confidential documents* (USDC

Order of June 20, 1974; Court of Appeals Opinion denying mandamus in Action No. 74-2206 filed January 17, 1975):

In June 1973, plaintiffs served a "Request for Production of Documents." Request No. 7 seeks production of the personnel files of each member, each hearing representative, and of the executive officer of the state parole board. Requests numbered 14, 15, 18, 20, 21, and 22 each relate to various specified categories of departmental documents.[3] Defendants objected to these requests for documents upon the grounds that the documents were irrelevant, confidential, and privileged. In March of 1974, plaintiffs moved for an order compelling the discovery of these documents, including discovery of the personnel files. The matter was briefed, argued and submitted before the United States magistrate, who on April 24, 1974, issued Findings and Recommendations, including a recommendation "that with respect to plaintiffs' motion for production of documents the same be granted as to each and every item." A copy of the magistrate's Findings and Recommendations are annexed hereto in Exhibit B of the Appendix to this petition.

Upon defendants' request for review, the district court on June 20, 1974, issued an order adopting the magistrate's Findings and Recommendations as the decision and order of the court with certain modifica-

[3]The text of these requests is quoted in footnote 5 of the opinion of the Court of Appeals in No. 74-2206 (Appendix, Ex. A, pp. v-vi).

tions, including a protective order limiting inspection of the personnel files to counsel of record and no more than a total of 2 investigators designated by such counsel and then only to the extent necessary to the conduct of this action. A copy of this order is annexed in Exhibit B of the Appendix to this petition. The district court's order further provided "that defendants' request for an *in-camera* inspection of the personnel files for a determination of the relevance and a balancing of the materiality of their contents prior to release of the files to plaintiffs is denied."

Defendants filed in the Court of Appeals a petition for writ of mandamus or prohibition and application for stay, whereupon the Court of Appeals granted a stay, required an answer to be filed to the petition and calendared the matter for argument on November 14, 1974. The matter was argued and submitted on that date, and on January 17, 1975, the Court of Appeals rendered its opinion denying the petition and vacating the stay. A copy of this opinion is annexed as Exhibit A of the Appendix to this petition.

C. Other Discovery Afforded Plaintiffs.

Plaintiffs have been afforded massive discovery independent of the discovery provisions herein sought to be reviewed:

(1) Interrogatories: Plaintiffs have propounded three sets of interrogatories which have asked hundreds of questions of each of the ten defendants. The last two sets of these interrogatories have focused on the parole consideration process and attendant circumstances.

(2) Requests for Admissions: Plaintiffs have propounded two sets of requests for admissions by each of the ten defendants, and each set has included well over 100 such requests. These requests for admissions have similarly focused on the parole consideration process.

(3) Request for Documents: Plaintiffs have propounded numerous requests for documents which seek production of all documents relating to dozens of specified categories of documents in the possession of or accessible to the Department of Corrections or the Adult Authority.

(4) Recordings: Plaintiffs have tape recorded in their entirety, including the deliberations of panel members, approximately 1,200 separate parole consideration proceedings.

(5) Visits and observations: Many persons are available to testify for plaintiffs with respect to the nature of the parole consideration process and of the interests at stake. Twenty-four attorneys designated by plaintiffs, including plaintiffs' counsel of record, have attended and taken notes at 160 parole consideration hearings. Many dozens of lay persons designated by plaintiffs have attended as operators of recording devices at a total of approximately 1,200 parole consideration hearings. Each member of plaintiffs' class (over twenty thousand prisoners) has participated in parole consideration hearings, and counsel for plaintiffs, as well as designees of such counsel, may interview these members of the class. In addition, plaintiffs may call members of the parole board, hearing of-

ficers of the parole board, and numerous correctional personnel who have personal knowledge of these proceedings.

(6) Depositions: Plaintiffs have taken lengthy depositions of nine members of the parole board, of the administrative officer of the parole board, of three parole board hearing officers, of a psychiatrist employed by the Department of Corrections, of a correctional counselor, and of two research supervisors of the Department of Corrections. The depositions of the parole board members and hearing officers focused on their backgrounds, education, and work experience, as well as on the parole consideration process. These depositions total over 1,400 pages in length.

(7) Inmate files: Under order of the district court, plaintiffs are entitled to examine the contents of the correctional files of any 200 inmates designated by them. The number of items which are highly confidential and entitled to protection under a qualified privilege of non-disclosure, as asserted herein, is small when compared with the total contents of the files. Plaintiffs will be authorized to examine this larger portion of the contents of inmate files, with respect to which a qualified privilege is *not* asserted, regardless of the outcome of this petition.

As a result of the discovery outlined above, plaintiffs have an abundance of information and sources of information bearing on (1) the background, possibility of bias, and competence of parole board members and hearing representatives; (2) the nature of parole consideration proceedings, the manner in which they

are conducted, the interests at stake, the kind of information relied on, and the factors and circumstances considered in arriving at decisions as a result of these proceedings; (3) the ability or capacity of inmates to handle themselves at such proceedings; (4) whether inmate files, upon which hearings panels rely, contain incomplete, misleading, or false information.

SUMMARY OF ARGUMENT

The district court's discovery orders are not only indiscriminate (they require production of all personnel records of all parole board members and hearing officers and all contents of all correctional files of any 200 inmates designated by plaintiffs), the orders also preclude any attempts by defendants to segregate particular confidential documents for an informed determination by the district court of whether their confidentiality is outweighed by any utility the documents may have to the plaintiffs in their action below.

Under Rule 26(b)(1), Federal Rules of Civil Procedure, the federal courts recognize a qualified privilege to protect confidential government documents from unnecessary disclosure. The qualification of the privilege is that a confidential document may be ordered disclosed if its confidentiality is outweighed by the utility of the document to the proponent of its discovery in the pending action. This qualified privilege extends to confidential state government docu-

ments. The personnel files of members and hearing officers of a state parole board, as well as specified confidential portions of the contents of correctional files of state prisoners are confidential in nature. Indeed, by virtue of the protective provisions, even though inadequate, in the discovery orders, the magistrate and each of the judges below recognized that these categories of documents are confidential.

These categories of documents are of no apparent utility to the plaintiffs in this civil rights class action brought by state prisoners to determine what process is due at administrative proceedings concerning parole or discipline. Plaintiffs have been furnished massive discovery of the nature of these proceedings and of the interests they involve.

Under the circumstances of this case it was proper for counsel, the attorney general, to assert the qualified privilege. First, unlike an absolute privilege, the assertion of a qualified privilege does not call for abdication of judicial control over the evidence, but seeks an affirmative exercise of judicial control. Second, as the confidential nature of the documents is apparent and was recognized by the judges below, a formal writing from the head of the department which controls the documents was not necessary. Third, in asserting the qualified privilege, the attorney general acted on behalf of a party to the action who was, in fact, the head of the department which controls the documents ordered produced. Fourth, with respect to the confidential contents of inmate files, a more particularized and formal assertion of confidentiality is

impossible until the files to be produced are designated by plaintiffs. Accordingly, the reasons heretofore relied on for requiring a formal and personal assertion of privilege are absent.

Because the confidentiality of the documents is apparent, the utility of the documents is not apparent, and there is an abundance of alternate sources of information, the assertion by counsel of the qualified privilege of non-disclosure should not have been rejected without an *in-camera* inspection and informed balancing by the court of the competing interests involved.

The qualified privilege should not be viewed by the courts with hostility as an impediment to disclosure of the truth in pending litigation. Unlike an absolute privilege, the qualified privilege does not block information from the court, but only from an adversary, and then only where legitimate public policy favoring confidentiality outweighs the litigant's need for the information in the pending action. The compelled indiscriminate production of the documents for adversary inspection will not enhance the court's search for the truth. Even if the contents of the documents are highly relevant and material to the subject matter of the action (in which case the documents would probably be ordered produced anyway, after an *in-camera* inspection and balancing), there is no requirement that plaintiffs furnish them to the court. Indeed, to the extent that documents would tend to undermine plaintiffs' allegations, it is likely counsel would not volunteer them for the court's consideration.

The compelled disclosure of confidential government documents under a protective order is neither the equivalent of, nor an adequate substitute for, a qualified privilege of non-disclosure, and is not the equivalent of an informed and particularized exercise of judicial discretion.[4] Neither the magistrate nor the district judge examined any of the documents prior to compelling their disclosure for adversary inspection.

Relief from the requirements of the district court's discovery order is available in no other court, and review on appeal after judgment in the district court will be inadequate to cure the irreparable harm which will result from adversary inspection of the confidential documents.

The standard for when mandamus should be granted to review interlocutory discovery orders differs between the Courts of Appeals. The Court of Appeals in this case relied on an extraordinary standard in denying mandamus. There is a need to delineate uniform standards for when mandamus should be granted to review such orders, and the need is especially great

[4]The protective provisions are illusory and inadequate. Although the protective orders limit inspection of the actual documents, the use of copies is less limited, and discussion of their contents is not limited. Use of the documents is limited only by a vague standard: to the extent necessary to the conduct of this action. The orders do not specify what measures must be taken by counsel (there are presently 7 counsel of record for plaintiffs, from at least 4 different law firms) or their investigators to assure compliance with the protective provisions, nor are there provisions for the ultimate disposition of copies, or copies of copies, which counsel may make of the documents. The risk of irreparable harm from further disclosure of the documents or their contents, through mistake, inadvertence, or otherwise, will continue beyond the termination of this litigation.

in actions initiated by state prisoners against state officials.

To the extent the term "privilege" in Rule 26(b)(1) takes its meaning from the law of evidence, section 501 of the Federal Rules of Evidence can be expected to generate divergent views concerning the discovery of confidential government documents. This circumstance also increases the need for advisory mandamus. Certiorari should be granted to review this aspect of the decisions below and to announce a uniform standard for mandamus.

REASONS FOR GRANTING THE WRITS

I

THE DECISIONS BELOW RAISE EXCEPTIONALLY SIGNIFICANT PROBLEMS CONCERNING THE SCOPE OF DISCOVERY OF CONFIDENTIAL GOVERNMENT DOCUMENTS IN FEDERAL CIVIL RIGHTS ACTIONS BROUGHT BY PRISONERS AGAINST STATE OFFICIALS.

It has been estimated that assertions of privilege constitute a large percentage of all judicial determinations of objections to discovery. 4 Moore's Federal Practice, ¶26.83 [9.-3], fn. 33, at page 26-627 (27%). During discovery in civil rights actions brought by prisoners, these questions nearly always arise. Yet, the meaning of privilege, and judicial treatment of assertions of privilege, remain uncertain and in flux between the federal courts.

The present case exposes important harmful effects which these uncertainties impose on the administra-

tion of civil justice, as well as the need for this Court to delineate workable uniform standards for the assertion and treatment of claims under this paramount limitation of the scope of discovery.

In *United States v. Reynolds,* 345 U.S. 1 (1953), this Court stated that "privileged" as used in the rules for discovery should be understood as the term is used in the law of evidence, and that privilege is to be asserted formally by the head of the department controlling the matter after he has actually personally considered the documents with respect to which a privilege is asserted. 345 U.S. at 6, 7-8.

A. It Was Impossible to Follow Reynolds to Protect The Inmate Files.

By its terms, the discovery order for production of inmate files precludes attempts to meet the procedures of *Reynolds.* Until the plaintiffs designate the 200 inmates whose files are to be produced, it is impossible to actually consider the particular documents whose confidentiality will be jeopardized. When the first group of about 20 inmates was designated, attempts to segregate particular documents for such consideration were met with threats of contempt. The resulting order makes it unmistakably clear that nothing may be withheld from immediate production on demand by plaintiffs:

> "All such central files made available upon request by plaintiff shall be produced without any material, memos, documents, summaries, reports, letters, or other papers of any kind, shape or form, having been removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection." (USDC order, December 3, 1974, Appendix, Exhibit D, page xxvi).

B. The Definition of "Privilege" Should Be Re-evaluated.

The reference in the *Reynolds* opinion to the law of evidence for a definition of the term "privilege" as used in discovery is unworkable. Rule 26(b)(1) states that the inadmissibility at trial of the information sought is no ground for objection to a discovery demand. Indeed, in federal civil actions the law of evidence concerning privilege for confidential state government documents is indefinite and will likely remain so in view of the provisions of section 501 of the new Federal Rules of Evidence.[5] Without delineating standards for doing so, this section invites ad hoc determinations of claims of privilege.

The "law of evidence" lacks both the flexibility and the precision to accommodate the range of competing interests involved in pre-trial discovery demands for the disclosure of government documents which are confidential. Whether particular documents are *confidential* depends neither on the law of evidence nor

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[5] ARTICLE V. PRIVILEGES

Rule 501.

GENERAL RULE

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

on the nature of the pending action, but on independent interests and policies. Whether documents which are confidential should nevertheless be disclosed should depend on the needs and circumstances peculiar to the pending action.

For discovery purposes, "privileged" should be taken to mean that a particular document which is confidential need not be disclosed because its confidentiality is not outweighed by its utility and necessity in the pending action. See *Frankenhauser v. Rizzo,* 59 F.R.D. 339, 342, 344 (E.D.Pa. 1973).

C. May "Privilege" Be Raised by Counsel?

Under the circumstances of this case it was appropriate and permissible for counsel to assert a qualified privilege of non-disclosure. The reasons for the procedure in *Reynolds* that privilege be asserted as a formal matter by the head of the department having control over the documents, and then only after having personally considered each document, are absent in the present case.

First, in *Reynolds* an absolute privilege was asserted such that not even the district court was permitted to see the documents to consider whether the privilege was well taken. Secondly, the confidential nature of the documents sought in *Reynolds* was not apparent until the court was furnished the writings which comprised the formal assertion of privilege. Third, the head of the department having control over the documents in *Reynolds* was not a party to the action before the court.

In the present case only a qualified privilege was asserted with the realization that disclosure *in camera* would be appropriate for a determination of whether the utility and necessity of the documents outweigh their confidentiality. Second, the confidential nature of the documents in question is apparent and was recognized below by the insertion of at least some protective provisions in the discovery orders. Third, the head of the department having control over the documents, namely, petitioner Procunier, was a party defendant below on whose behalf the attorney general acted in asserting the qualified privilege. Fourth, under the December 3, 1974 discovery order it is impossible for the department head to meet the review process of *Reynolds* prior to disclosing the documents for adversary inspection. Fifth, as the documents in the present case were to be presented to the court for an *in-camera* inspection and balancing of the competing interests, the court was called upon to exercise direct control over the evidence and not to abdicate such control to the unfettered discretion of the department head. Sixth, the utility of these documents to plaintiffs is not apparent. Seventh, the possible necessity of these documents to plaintiffs' case is remote in view of the abundance of alternative sources of information available to pursue the points to which the documents are said to relate.

There are additional reasons for re-evaluating the reliance *Reynolds* would place on the personal judgment of the head of the department in determining whether confidential documents should be disclosed. First, the policies and interests on which the depart-

ment would rely are different from the policies on which the court would rely to evaluate the claim of privilege. Indeed, the department head would be ill-equipped to use the same policy considerations used by the judge. The judge must weigh the confidentiality of the documents against their utility and necessity in the pending action. The department head does not balance competing interests of the litigants,[6] but merely informs the court of the confidentialty of the document. In the present case, the personal judgment of the department head is not necessary to inform the court that employee personnel files are of a confidential nature. Whether the confidential documents are also privileged would depend on the circumstances of this particular case, and, as *Reynolds* states, this determination is for the court and not the executive.

Second, the interests involved in protecting these confidential documents from needless disclosure are not limited to those of the department or of the department head. In this case, not only are departmental interests and institutional security at stake, but also the privacy and safety of other individuals are jeoparized by the compelled disclosure of confidential informers' statements, personnel files, investigative reports on visitors, crime partner information, and other sensitive categories. The courts, no less than the department head, have reason to not needlessly jeopardize such third party interests.

[6]In the present case, defendants' offer to reevaluate the confidentiality of particular documents in light of specifications by plaintiffs of their need for them, was made for the purpose of saving the district court from unnecessary *in-camera* inspection.

D. The Treatment of Confidential Matters:

The decisions below raise serious questions concerning the treatment which should be accorded confidential state government documents not protected by a recognized absolute privilege.

The district court refused defendants' request for an *in-camera* inspection of the personnel files to determine whether their confidentiality is outweighed by their utility and necessity to plaintiffs in the pending action. The district court's indiscriminate treatment of the confidential items in inmates' files is more aggravated and precludes an opportunity to segregate particular documents for such an *in-camera* inspection prior to disclosure to plaintiffs. Instead, the district court compelled disclosure of the documents under a protective order purporting to limit plaintiffs' use of them.

If the confidentiality of these documents outweighs their utility and necessity to plaintiffs in the pending action, the documents are entitled to a privilege against *any* disclosure. The protective order is no substitute for the informed judicial discretion which would result from an *in-camera* inspection and balancing of the competing interests, and is not the equivalent of a privilege against disclosure if appropriate upon such inspection and balancing. Protective orders, more extensive than were provided in the present case, would be appropriate if, after an *in-camera* inspection and balancing, the court determined that the utility and necessity of the documents outweighed their confidentiality and compelled

their disclosure. However, where, as here, the confidentiality of the documents is apparent, and their utility and necessity to the action is not apparent, these confidential state government documents, at the minimum, should be entitled to an *in-camera* inspection and informed balancing of competing interests prior to their compelled disclosure for adversary inspection. Any less informed treatment of such documents unnecessarily jeopardizes exceptionally significant interests. In this case the discovery is demanded by counsel for a class of plaintiffs which includes every male felon in prison or on parole in California, and the information demanded will invade the personal privacy of the members of the parole board and jeopardize the personal safety of prisoners who have given information in confidence against other prisoners.

II

THE DECISIONS BELOW RAISE IMPORTANT QUESTIONS CONCERNING THE STANDARD FOR WHEN MANDAMUS SHOULD BE GRANTED TO REVIEW INTERLOCUTORY DISCOVERY ORDERS.

The likelihood of immediate irreparable harm to the important third party interests involved, the large number of actions brought by prisoners, and the little guidance for the court's ad hoc determinations of qualified privilege are circumstances indicating a need for mandamus proceedings to review interlocutory discovery orders.

In the present case the district court's discovery orders will result in prejudice to the defendants as

important as the prejudice which may result from the erroneous granting of the ultimate relief demanded in the action. Indeed, the harm which can be caused by these discovery orders is irreparable, whereas the harm which could be caused by the erroneous granting of the ultimate relief in the action would be subject to cure on appellate review. The problem is especially acute in the present case where (a) plaintiffs are state prisoners; (b) defendants are members of the state parole board and the state director of corrections; (c) the confidentiality of the state government documents is apparent and involves not only significant departmental interests, including institutional security, but also involves the personal safety and privacy of third persons; (d) the utility and necessity for the documents to plaintiffs in the pending action is not apparent.

Under the provisions of section 501, Federal Rules of Evidence, it would appear that the standards for assertion and treatment of privilege will evolve on a case by case basis with little guidance for the courts' ad hoc determinations.

The standard for granting mandamus to review interlocutory discovery orders should be akin to the standard of review on appeal to which the interests at stake would be entitled but for the risk of intervening irreparable harm. Interlocutory review should be available under Title 28 United States Code section 1651 not only to cure a usurpation of power, an act in excess of jurisdiction, or a failure to exercise jurisdiction, but also to save important public

and private interests from irreparable harm attributable to a discovery order which the district court had "jurisdiction" to enter, but which is clearly or plainly erroneous.[7] See *United States Board of Parole v. Merhige,* 487 F.2d 25 (4th Cir. 1973), cert. denied sub nom. *Merhige v. United States Board of Parole,* ..... U.S. ..... (1974).

III

THE DECISIONS BELOW CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS CONCERNING THE STANDARD FOR WHEN TO GRANT MANDAMUS TO REVIEW INTERLOCUTORY DISCOVERY ORDERS.

There is a variance between the Courts of Appeals with respect to the standards for when mandamus should be granted to review interlocutory discovery orders. See 4 *Moore's Federal Practice,* ¶26.83[9.-3]; Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harvard Law Review 595 (1973). The opinion of the Court of Appeals in No. 74-2206 acknowledges that this standard is in flux between the circuits and that there is authority for lessening the extraordinary showing necessary to invoke mandamus. (Appendix, Exhibit A, fn. 6 at pages vi-vii).

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[7]Even under the extraordinary standard used by the Court of Appeals in this case, mandamus should have been granted. Under Rule 26(b)(1), a district court lacks authority to compel production of privileged matter. As the confidentiality of the documents is apparent, and their utility not apparent, the documents are privileged from disclosure, until the court has looked at them, balanced the competing interests, and determined their utility and necessity to plaintiffs outweighs their confidentiality.

The Court of Appeals opinion in the present case refers to three different standards: (1) mandamus is appropriate where the district court has exceeded its jurisdiction, improperly failed to exercise jurisdiction, or has taken action amounting to a usurpation of power; (2) mandamus is appropriate where ordinary remedies are inadequate and there are present exceptional and extraordinary circumstances which require the issuance of the writ to present a grave miscarriage of justice; (3) madamus is appropriate depending on the degree to which the district court's actions can be legally questioned, the damage to petitioner which is not correctable on appeal, and the ability to correct the district court's actions by appeal.

The Court of Appeals for the Eighth Circuit would grant mandamus to review an interlocutory discovery order which presented a "really extraordinary" question and where appeal after disclosure would be inadequate. *Pfizer v. Lord,* 456 F.2d 545, 548 (8 Cir. 1972). In the Court of Appeals for the Seventh Circuit, mandamus may be granted to review such orders where there is a question of substantial importance and where appeal would be inadequate. *Harper and Row Publishers, Inc. v. Decker,* 423 F.2d 487, 492 (7th Cir. 1970), affirmed, 400 U.S. 348 (1971) (by an equally divided court). The Court of Appeals for the Fourth Circuit has granted mandamus to review and vacate an interlocutory discovery order on the ground that the order was clearly erroneous. *United States Board of Parole v. Merhige, supra,* 487 F.2d 25 (4th Cir. 1973).

In summarily denying the petition for mandamus in No. 74-3392 (Appendix, Exhibit C), the Court of Appeals may be assumed to have applied the extraordinary standards to which reference is made in the Opinion in No. 74-2206. The two judges who participated in No. 74-3392 also participated in No. 74-2206.

These conflicts justify the grant of certiorari to review the decisions below.

IV

THE FOURTH AMENDMENT PRECLUDES COMPELLING PRODUCTION OF CONFIDENTIAL DOCUMENTS WITHOUT A PRIOR DETERMINATION THAT THE DOCUMENTS ARE NOT PRIVILEGED.

As the decisions below violate the fundamental right to be free from unreasonable search and seizure, they must be rectified. Expectations of privacy, insofar as they are reasonable, are protected by the Fourth Amendment. Compulsory process for the production of documents may not issue in derogation of the Fourth Amendment. An order compelling the disclosure of privileged documents is not authorized by statute, and is as defective as is a search warrant issued without probable cause. An order compelling the production of confidential documents without a prior determination that their utility in the litigation is paramount, is as defective as is a general search warrant.

The essence of the Fourth Amendment is the protection of reasonable expectations of privacy. When a person communicates information to government officials in confidence, he may reasonably expect that the confidence will be maintained unless a justification for disclosure is found to outweigh the jutification for confidentiality. In such circumstances, the expectation is not that disclosure is inevitable *(see Couch v. United States,* 409 U.S. 322, 335 (1973)), but rather that confidentiality will be asserted. Similarly, when a government official's duties include control over confidential documents, he may reasonably expect that he will not be compelled to disclose the information unless the justification for disclosure is found to outweigh the reasons for confidentiality. In such circumstances, the official cannot be said to be assuming a duty to disclose the documents *(see Davis v. United States,* 328 U.S. 582, 589-590 (1946), but rather is assuming a duty to assert the confidentiality of the documents. In short, as it is reasonable to expect that confidential documents will not be disclosed unless it is shown that the justifications for disclosure are paramount, such expectation is protected by the Fourth Amendment.

It was recognized early in our history that the essence of a search and seizure is not the physical intrusion and taking of property, but is the element of compulsion. See *Boyd v. United States,* 116 U.S. 616, 621-622 (1886). Compulsory process for the production or inspection of documents is thus subject to the limitations inherent in the Fourth Amendment.

See *United States v. Dionisio,* 410 U.S. 1, 11 (1973); *See v. City of Seattle,* 387 U.S. 541, 544-545 (1967). Accordingly, an order pursuant to Rule 37 of the Federal Rules of Civil Procedure, compelling a party to produce documents, is subject to the limitations of the Fourth Amendment.

Just as a search warrant may issue only upon probable cause, compulsory process may issue only upon statutory or constitutional authorization. See *Okla. Press Pub. Co. v. Walling,* 327 U.S. 186, 209 (1946). Rule 26(b)(1) of the Federal Rules of Civil Procedure explicitly excepts from discovery matters which are privileged. Confidential state documents are privileged unless there is a showing and a determination that their utility in the litigation is paramount to their confidentiality. Accordingly, a court order compelling the production of confidential documents, without an *in-camera* inspection and determination, is necessarily an order compelling the production of privileged documents. As such an order is explicitly precluded by Rule 26(b)(1) of the Federal Rules of Civil Procedure, it is analogous to the issuance of a search warrant without probable cause.

Moreover, there is no constitutional authorization for compelling the production of confidential documents without any informed assessment as to whether or not their utility in the litigation is paramount. As it is reasonable to expect that disclosure will not be compelled in the absence of such a determination, the Fourth Amendment precludes the issuance of

such an order. The Fourth Amendment precludes the conclusion that simply by virtue of having been named as a defendant in a civil proceeding, the defendant must forfeit all confidential documents regardless of their utility in the litigation.

Even when compulsory process is issued pursuant to a statutory or constitutional authorization, it runs afoul of the Fourth Amendment if the specification of the documents is inadequate or excessive. See *Okla. Press Pub. Co. v. Walling, supra,* 327 U.S. 186, 208-209 (1946); *United States v. Morton Salt Co.,* 338 U.S. 632, 652 (1950). "'[A]dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry,' (citation omitted)." *McPhaul v. United States,* 364 U.S. 372, 382 (1960). Accordingly, where the precise content of the documents is not known, greater latitude is reasonable. See *McPhaul, supra,* 364 U.S. at 382. Conversely, where as here the precise contents of confidential documents can be known by examination of the documents *in camera,* a general order compelling their production is clearly unreasonable.

Legitimately authorized compulsory process is similarly invalid under the Fourth Amendment if the documents sought are not reasonably relevant to the underlying purpose of the authorization. See *Okla. Press Pub. Co. v. Walling, supra,* 327 U.S. 186, 208-209 (1946); *United States v. Morton Salt Co., supra,* 338 U.S. 632, 652 (1950). By its terms the underlying purpose of Rule 26(b)(1) is to authorize the discovery

of matters which are not privileged. If confidential documents are privileged because their utility in litigation is outweighed by the need for confidentiality, such documents may not at the same time be deemed to be discoverable within the meaning of Rule 26(b)(1). Accordingly, a general order for the production of confidential documents without a prior showing and determination that the utility of the documents in the litigation outweighs the interest in confidentiality is unreasonable.

"The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." *Okla. Press Pub. Co. v. Walling, supra,* 327 U.S. 186, 208 (1946). When the Federal Rules of Civil Procedure are utilized to vitiate this protection, intervention by this Court is warranted. As observed by Mr. Justice Holmes: "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." *Fed. Trade Com. v. Amer. Tobacco Co.,* 264 U.S. 298, 306 (1924).

V

SPECIAL REASONS JUSTIFY GRANTING A WRIT OF CERTIORARI TO REVIEW THE DISTRICT COURT'S DISCOVERY ORDER OF DECEMBER 3, 1974, AND RELIEF FROM THIS ORDER IS NOT AVAILABLE IN ANY OTHER COURT.

The district court's discovery order of December 3, 1974, indiscriminately compels the production for adversary inspection and copying all of the contents of all of the correctional files of any 200 state prison inmates designated by plaintiffs. By its terms, the order also makes compliance with the *Reynolds* procedures impossible, as the order precludes any attempt to segregate particular confidential documents for any purpose prior to plaintiffs' inspection and copying of them.

The protective provisions of the district court's order are illusory and patently inadequate. The order limits physical inspection of the documents to counsel of record for plaintiffs and to no more than two other persons each of whom must be a member of the bar or a certified law student. However, there are presently seven attorneys of record for plaintiffs, from at least four different law firms. Thus nine persons are presently eligible to physically inspect the inmate files.

The discovery also provides that plaintiffs may make photocopies of any and all contents of the 200 inmate files. Two protective provisions, also illusory, apply to this part of the order. The order requires plaintiffs' counsel to obtain the consent of inmates prior to making photocopies of the contents of their

files, and also provides that the photocopies may not be used except as necessary to acquittal of their duties of representation in this case. However, the highly confidential items in an inmate's file include items with respect to which the inmate's consent for copying is irrelevant. Such items include reports from confidential informants against the inmate, investigative reports of certain visitors, sensitive clinical or psychiatric data concerning the inmate, and confidential communications from third parties including judges, district attorneys, and other persons outside the prison system.

The restriction of the use of photocopies is an illusory reliance on the self-restraint of a vigorous advocate, and would provide no adequate relief from the disclosure, through inadvertence or mistake, of information which would jeopardize the personal safety or invade the personal privacy of other persons. Plaintiffs' attorneys in this action represent every adult male felon in prison or on parole in the California state prison system. The courts are aware that there are inmate factions, and that the competition between such factions includes threats, intimidation, blackmail, extortion, and violence. By virtue of the class designation in the action below, counsel for plaintiffs represent and have access to inmates included in all of these factions.

The possible utility in this action of the information in these relatively few highly confidential items in the inmate files is very remote. The harm which can result from any improper disclosure or use of copies

of the documents or their contents is significant. Neither this harm, nor the risk of harm could be corrected on appeal after disclosure of the documents.

Relief from the district court's order of December 3, 1974, is not available in any other court. Repeated assertions of the confidential nature of the contents of the inmate files, and repeated requests for an *in-camera* inspection of them prior to disclosure for adversary inspection were rejected by the district court. Preliminary steps taken to segregate particular confidential items from the inmate files which have to this point been designated by plaintiffs were met with threats of contempt proceedings against defendants and defendants' counsel. These preliminary steps resulted in the peculiarly detailed provision in the district court's order that all of the contents of all of the files of the inmates designated by plaintiffs must be furnished ". . . without any material, memos, documents, summaries, reports, letters or other papers of any kind, shape or form, having been removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection." (Appendix, p. xxvi).

Defendants' prompt attempt to obtain review by mandamus proceedings in the Court of Appeals was summarily denied by that court.

CONCLUSION

For the above reasons, petitioners respectfully request this Court to issue writs of certiorari to the United States Court of Appeals for the Ninth Circuit, and to the United States District Court for the Northern District of California, to review and reverse the decisions in this case.

Dated, February 14, 1975.

Respectfully submitted,

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Attorneys for Petitioners.

(Appendix Follows)

APPENDIX

Exhibit A

United States Court of Appeals
for the Ninth Circuit

No. 74-2206

HENRY W. KERR, CURTIS O. LYNUM, WALTER A. GORDON, JR., MANLEY J. BOWLER, LELAND M. EDMAN, JAMES H. HOOVER, CHARLES E. BROWN, DANIEL R. LOPEZ, individually and in their official capacities as members of the California Adult Authority, JOSEPH A. SPANGLER, individually and in his official capacity as Administrative officer of the California Adult Authority, RAYMOND K. PROCUNIER, individually and in his official capacity as Director of Corrections of the State of California; their agents, employees, and successors in interest,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent,

JOHN VAN GELDERN, DANNY JONES, CHARLES EDWARD VAN NORT, BILLY RAY LEWIS, ROBERT NEWTON GARDNER, JR., JAMES MURRIN, GEORGE CHATFIELD, individually and on behalf of all others similarly situated,

Real Parties in Interest.

[January 17, 1975]

On Petition for Writ of Mandamus
or Prohibition

OPINION

Before: HAMLEY, MERRILL and DUNIWAY, Circuit Judges.

HAMLEY, Circuit Judge:

Petitioners seek from this court a writ of mandamus or prohibition under 28 U.S.C. § 1651, vacating an

order of respondent district court which granted a motion of the real parties in interest requiring petitioners to produce various documents by way of discovery under Rules 34 and 37 of the Federal Rules of Civil Procedure. We deny the petition.

The real parties in interest, who seek the documents, are seven California state prisoners who have joined as plaintiffs in a civil rights action against petitioners in the respondent district court.[1] Plaintiffs in that suit assert district court jurisdiction under 28 U.S.C. § 1343, 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 2201 and 2202. Plaintiffs brought the action on behalf of themselves and of a class, divided into several subclasses, consisting of all others similarly situated.[2]

Petitioners in this mandamus proceeding are the defendants in the civil rights action described above. They constitute the members of the California Adult Authority, two state administrative officers, their agents, employees and successors in interest, as described in the caption of the complaint.

Plaintiffs in the civil rights action seek both declaratory and injunctive relief. They request a declaratory judgment that the acts of the defendants pertaining to the revocation, rescission or suspension of parole, the fixing or refixing of sentences, and the imposition of sanctions for alleged infractions of rules, as described in numerous paragraphs of the complaint, contravene the rights of the plaintiffs and their class under the Fifth, Sixth and Eighth Amendments and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

[1] In the district court the civil rights action carries docket number C-72-2088 SAW.

[2] After the petition was filed in this court, the district court entered an order providing that the suit could be maintained as a class action.

The injunctive relief plaintiffs seek is an order requiring defendants and their agents to accord plaintiffs and their class certain specified procedural rights with regard to all proceedings for the revocation, suspension or rescinding of parole, the fixing or refusing to fix the terms of sentences, and the imposing of serious disciplinary sanctions. The rights sought pertain to giving notice of such proceedings, providing an opportunity to be heard, to present witnesses, and to cross-examine witnesses; according the right to be represented by counsel; providing the right to be heard by an unbiased panel or official and the right to challenge any panel or official for cause; and providing a verbatim transcript of any such hearing and a written statement of the reason for the action taken and the evidence relied on.

During the course of discovery in the civil rights action, plaintiiffs served upon petitioners a set of interrogatories under Fed. R. Civ. P. 33 and a request for production of documents under Fed. R. Civ. P. 34. Petitioners made objections to the requests for documents and to certain interrogatories. As to the requested documents, petitioners also argued that an *in camera* inspection was necessary in order to determine relevancy and evaluate their claimed privileges.

Plaintiffs thereupon moved under Fed. R. Civ. P. 37 to compel discovery. The district court referred the motion to a United States magistrate for findings and recommendations.

Following a hearing, the magistrate recommended that all requests for production of documents be granted, that some but not all of the interrogatories be answered, and that costs in the amount of $500 be levied against petitioners under Fed. R. Civ. P. 37(a)(4). Protective orders concerning certain of the document requests were also suggested.[3]

Petitioners sought a review by the district court of the magistrate's findings and recommendations, complaining primarily about the granting of the requests for the production of documents. After such a review, the district court, with reference to the documents here in issue, followed the magistrate's recommendations, including denial of the request for *in camera* inspection. However, the district court modified the recommended protective order by being more restrictive of the persons to whom the documents in request number seven could be revealed.[4] Subsequently,

[3]Several document requests were subject to a limited time period. And with reference to request number seven, the magistrate advised limiting the revelation of the documents to plaintiffs' attorneys and the personnel in their offices.

[4]The protective order with reference to request number seven, as entered by the district court, reads:

> "[T]hat no . . . file of any plaintiffs, or any copy of any of its contents, and no personnel file of any member of the Adult Authority, hearing representative or executive officer, nor any copy of any of its contents, shall be shown to any person except counsel of record for the plaintiffs and no more than a total of two investigators designated by such counsel, and then only to the extent necessary to the conduct of this action."

the district court refused to stay the discovery order pending the disposition of this petition.

Being dissatisfied with the district court's order under Fed. R. Civ. P. 37, petitioners instituted this mandamus or prohibition proceeding and requested a stay pending its disposition. The petitioners contend that it was improper for the district court to allow discovery of the documents requested under Fed. R. Civ. P. 34, specifically those sought in requests numbers 7, 14, 15, 18, 20, 21 and 22 of the plaintiffs' request for production of documents.[5] This court

[5]The requests for documents at issue are:

> "7. All files, including all personnel files, which are maintained by the Adult Authority or by the Department of Corrections, or by any officer or employee thereof, with respect to each member, each hearing representative, and the Executive Officer of the Adult Authority."
> "14. Each report submitted by any member, hearing representative, Executive Officer, or any other employee or official of the Adult Authority, including without limitation all reports of the type indicated at lines 9-11 of page 21 of the aforementioned deposition."
> "15. All written statements written or delivered by any member or hearing representative or the Executive Officer of the Adult Authority during the past 5 years favoring, opposing, or in any way commenting upon bills or other legislation or legislative proposal pending in the U.S. House of Representatives, the Senate of the United States, or the California Legislature."
> "18. All written proposals for any change whatsoever in the organization or operation of, qualifications for, or substantive criteria and procedures to be employed by the Adult Authority, including without limitation any of the individuals or groups listed in the foregoing item."
> "20. All memoranda written by the Chairman of the Adult Authority during the past 5 years, no matter to whom sent, including without limitation memoranda sent to other government organizations, agencies or officials, or to other members, hearing representatives, officials or employees of the Adult Authority."
> "21. All documents in effect on November 15, 1972 which pertain to any Policy Statement or Resolution issued by the Adult Authority, including without limitation any file maintained on any Resolution or Policy Statement and all such documents executed or issued subsequent to that date."
> "22. All documents, however formal or informal, issued during the *past calendar* year, which concern the Adult Authority's adoption

stayed the district court's order on September 20, 1974, at which time it also designated this petition for oral argument.

Preliminarily, it is necessary to examine the nature of the vehicle which brings the district court's order before this court for review. This is a petition for mandamus or prohibition pursuant to the All Writs Act, 28 U.S.C. § 1651. Mandamus is an extraordinary remedy. It is appropriately exercised where the district court has exceeded its jurisdiction, or has improperly failed to exercise jurisdiction, or has taken action amounting to an "usurpation of power." *Will v. United States,* 389 U.S. 90, 95-96 (1967); *Roche v. Evaporated Milk Ass'n.,* 319 U.S. 21, 26 (1943). This court set out its standard for granting mandamus in *Hartley Pen Co. v. United States District Court, etc.,* 287 F.2d 324, 328 (9th Cir. 1961).

> "In our view the remedy is available in an ordinary case within our jurisdiction if ordinary remedies are inadequate and there are present exceptional and extraordinary circumstances which require the issuance of an extraordinary writ to prevent a grave miscarriage of justice. . . ."[6]

of new policies, procedures, criteria, and the like, to be followed by members, hearing representatives, officials and employees, including without limitation all documents relating to a) Policy Statement No. 24, adopted March 27, 1973, and b) Resolution No. 129, revised and reissued May 21, 1973."

[6]The standard, for when mandamus should be granted to review interlocutory discovery orders, is in flux between circuits. 4 *Moore's Federal Practice* § 26.83 [9.—3] (2d ed., Supp. 1973). There is some authority

From an examination of *Hartley,* three factors are evident which determine the appropriateness of granting mandamus: the degree to which the district court's actions can be legally questioned, the damage to petitioner (not correctable on appeal), and the ability to correct the district court's actions by appeal. *See Heathman v. United States District Court,* 503 F.2d 1032 (9th Cir. 1974); *Belfer v. Pence,* 435 F.2d 121 (9th Cir. 1970).

Petitioners first direct their attention to the documents described in request number seven. *See* note 5, *supra.* These documents consist of the personnel files maintained by petitioners pertaining to each member of the Adult Authority, each hearing representative, and the Executive Officer of the Adult Authority. On the merits of the district court order, petitioners argue that the contents of these personnel files have no relevance to the subject matter of the civil rights action, and for this reason alone, the district court discovery order should be vacated with regard to request number seven.

One of the plaintiffs' allegations in their civil rights complaint is that members and executive personnel of the Adult Authority have "no expertise in arriving at fair decisions" because of their narrow partisan backgrounds, their bias against prisoners, their inexperience, and their failure to reflect a representative cross section of the population of California. As indi-

for lessening the extraordinary showing necessary to invoke mandamus. *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487 (7th Cir. 1970), *aff'd.,* 400 U.S. 348 (1971) (by an equally divided court); *Pfizer, Inc. v. Lord,* 456 F.2d 545 (8th Cir. 1972).

cated by the earlier review of the relief sought in the civil rights suit, plaintiffs do not attack the qualifications of petitioners with an expectation of obtaining a judicial determination that an Adult Authority so constituted cannot accord due process to prisoners who come before them. Instead, they expect that, by proving such an allegation, they will demonstrate the need of imposing stringent procedural requirements governing the functioning of the Adult Authority.

Since this would appear to be a proper line of attack for plaintiffs, the district court's holding of the personnel files relevant for discovery purposes is not so questionable as to invoke mandamus. For the question of relevancy "is to be more loosely construed at the discovery stage than at the trial." 8 Wright & Miller, *Federal Practice and Procedure,* § 2008 at 41 (1970). Thus under Fed. R. Civ. P. 26(b)(1), it is no ground for objection that information sought in pretrial discovery would not be admissible at trial, " 'if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.' . . ." *Olympic Refining Company v.. Carter,* 332 F.2d 260, 266 (9th Cir. 1964). In addition to discovering information pertaining to a party's case in chief, it is entirely proper to obtain information for other purposes such as cross-examination of adverse witnesses. *See United States v. Meyer,* 398 F.2d 66, 72 (9th Cir. 1968).

Because the issue of relevancy in discovery matters is subject to such a broad standard, a district court's decision will rarely be overturned by a petition for

mandamus.[7] *Heathman v. United States District Court* 503 F.2d at 1035. *Cf. Hartley Pen Co. v. United States District Court,* 287 F.2d at 328-332.

Petitioners argue, however, that established principles of California law and federal law create an absolute or qualified privilege for the personnel files covered by request number seven and all documents sought under requests numbers fourteen, fifteen, eighteen, twenty, twenty-one and twenty-two, and for this reason discovery should not have been ordered. In the alternative, petitioners argue that, at the very least, the district court should have required *in camera* inspection to ascertain relevancy and judge the need to maintain the confidentiality of the Authority's files.

The claim of privilege under California law is based upon California Evidence Code § 1040, and California Government Code §§ 6250-6260 and 6254(f) (Supp. 1974). However, the civil rights action was instituted in federal court under a federal statute, 42 U.S.C. § 1983, which was enacted particularly to vindicate federal rights against deprivation by state action. *See Monroe v. Pape,* 365 U.S. 167, 180 (1961). As this court recently pointed out in *Heathman v. United States District Court,* 503 F.2d at 1034: "[I]n federal question cases the clear weight of authority and logic supports reference to federal law on the issue of the existence and scope of an asserted pri-

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[7] For an example of where the determination on relevancy was found extraordinary and mandamus invoked, *see Sanderman v. Winner,* ..... F.2d ....., No. 74-1477 (10th Cir. Nov. 26, 1974).

We make no inference as to whether the information contained in the personnel files would be admissible at trial, as against a claim that it is irrelevant.

vilege. 2B Barron & Holtzoff, *Federal Practice and Procedure* (Wright ed. 1961), § 967 at 243; 4 *Moore's Federal Practice,* § 26.60 [7] at 26-255; 8 Wright & Miller, *Federal Practice and Procedure,* Civil § 2016 at 123; *Proposed Federal Rules of Evidence,* Rules 501-02."

The states's interest is that of a litigant, and not, as in diversity cases, that of a sovereign whose law is being applied in a foreign forum. Reference to federal law in this case is necessary on the issue of the existence and scope of the claimed privilege. *Heathman v. United States District Court,* 503 F.2d at 1034; *Fears v. Burris Manufacturing Co.,* 436 F.2d 1357, 1360-1361 (5th Cir. 1971); *Carr v. Monroe Manufacturing Co.,* 431 F.2d 384, 387-389 (5th Cir. 1970); *Colton v. United States,* 306 F.2d 633, 636 (2d Cir. 1962).

Federal statutory law, the Freedom of Information Act, 5 U.S.C. §§ 552(b)(6) and (7), is relied upon by petitioners to sustain their asserted privilege. The purpose of this Act was to expand the access of the public to official records of federal agencies, subject to stated exceptions. Among the exceptions to disclosure are those set out in § 552(b)(6)—personnel and medical files, and section 552(b)(7)—"investigatory files compiled for law enforcement purposes."[8]

This Act would not create a privilege for the requested documents for two reasons. First, its lan-

[8]The section 552(b)(7) exception has no relationship with the kinds of documents plaintiffs seek to discover. *See Bristol-Myers Co. v. F.T.C.,* 424 F.2d 935, 939-940 (D.C. Cir. 1970).

guage is limited to authorities "of the Government of the United States." 5 U.S.C. § 551(1). The civil rights suit involves California agencies. Secondly, the exceptions to the disclosure in the Act were not intended to create evidentiary privileges for civil discovery. *See Verrazzano Trading Corp. v. United States,* 349 F.Supp. 1401, 1403 (Cust. Ct. 1972); *Pleasant Hill Bank v. United States,* 58 F.R.D. 97, 99 (W.D. Mo. 1973); *Hodgson v. GMAC,* 54 F.R.D. 445, 446 (S.D. Fla. 1972); 4 *Moore's Federal Practice* § 26.61 [4.—3] at 26-276, 26-278 (2d ed.). They were intended only to permit the withholding of certain types of information from the public generally.

Petitioners also contend that the common law governmental privilege (encompassing and referred to sometimes as the official or state secret privilege) covers the requested documents. *Committee for Nuclear Responsibility, Inc. v. Seaborg,* 463 F.2d 788, 792-795 (D.C. Cir. 1971); *Carr v. Monroe Manufacturing Co.,* 431 F.2d at 388-390.

These cases, however, indicate that this is only a qualified privilege, contingent upon the competing interests of the requesting litigant and subject to disclosure especially where protective measures are taken, as in this case. But we do not have to reach the question of whether this privilege extends to these documents or if a further protective order in the nature of *in camera* inspection was necessary before allowing disclosure. The governmental privilege must be formally asserted and delineated in order to be raised properly. *United States v. Reynolds,* 345 U.S.

1, 7-8, 10-11 (1953); *Carr v. Monroe Manufacturing Co.*, 431 F.2d at 387. *See General Services Administration v. Benson*, 415 F.2d 878, 879 (9th Cir. 1969). *Cf. United States v. Nixon*, ... U.S. ....., ... (July 24, 1974) ("by a formal claim of privilege"); *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d at 792-793 (by implication).

In *United States v. Reynolds, supra*, the Supreme Court in discussing a claimed state secret privilege stated:

> "The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. . . ." 345 U.S. at 7-8.

Neither the Chairman of the Authority nor the Director of Corrections nor any official of these agencies asserted, in person or writing, any privilege in the district court.

The claiming official must "'have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced'"[9] and state with specificity the rationale of the claimed privilege. *Reynolds* is illustrative. The Court there continued, explaining:

[9] *United States v. Reynolds*, 345 U.S. at 8 n. 20, quoting *Duncan v. Cammell, Laird & Co.* [1942] A.C. 624, 638.

> "Of course, even with this information before him, the trial judge was in no position to decide that the report was privileged until there had been a formal claim of privilege. Thus it was entirely proper to rule initially that petitioner had shown probable cause for discovery of the documents. Thereafter, when the formal claim of privilege was filed by the Secretary of the Air Force, under circumstances indicating a reasonable possibility that *military secrets* were involved, there was certainly a sufficient showing of privilege to cut off further demand for the documents on the showing of necessity for its compulsion that had then been made." (Emphasis added.) 345 U.S. at 10-11.

In the civil rights suit, petitioners' counsel merely raised a blanket objection covering any and all documents in request numbers 7, 14, 16, 18, 20, 21 and 22. Formally claiming a privilege should involve specifying which documents or class of documents are privileged and for what reasons, especially where the nature of the requested documents does not reveal an obviously privileged matter. *See Pleasant Hill Bank v. United States*, 58 F.R.D. at 101. Since there may be information in the requested documents which should be protected, the petitioners may assert a privilege to a particular document or class of documents, and perhaps seek *in camera* inspection, at the time the documents are discovered in the district court. *See United States v. Reyonlds*, 345 U.S. at 10-11.

In sum, the petition fails to show such an usurpation by the district court that warrants the extraordinary

remedy of writ of mandamus. In promulgating the discovery order the district court did enter some protective measures. The granting of mandamus as to discovery orders is limited, and this case does not appear to present exceptional circumstances.

The stay of this court is vacated, and the petition for mandamus or prohibition is denied.

Exhibit B

United States District Court
Northern District of California

No. C-72-2088 SAW

John Van Geldern, et al.,
Plaintiffs,
vs.
Henry W. Kerr, et al.,
Defendants.

[Filed Jun. 20, 1974]

ORDER

Plaintiff's motion filed pursuant to Rule 37, Federal Rules of Civil Procedure, for an order telling defendants to answer certain interrogatories propounded pursuant to Rule 33, Federal Rules of Civil Procedure, and to produce certain documents requested pursuant to Rule 34, Federal Rules of Civil Procedure, having been submitted in the first instance to United States Magistrate David R. Urdan, pursuant to this Court's order of July 13, 1973; and

Magistrate Urdan having filed and served, on April 24, 1974, his Findings and Recommendations with respect to the aforementioned motion; and

Defendants' request for review of the aforementioned Findings and Recommendations having regu-

larly come on for hearing before this Court on June 13, 1974, and good cause appearing therefor,

It Is Hereby Ordered that, except for the modifications indicated below, the aforementioned Findings and Recommendations be, and they hereby are, adopted and rendered as the decision and order of this Court;

And It Is Further Ordered that, defendants' objections are sustained with respect to Interrogatories Nos. 1 and 2, parts B, F, G, H, I, K, and L. Defendants are to answer parts D of Interrogatories Nos. 1 and 2, but may do so in a reasonably abbreviated fashion as will be worked out among counsel.

And It Is Further Ordered that, with respect to the answers provided in Interrogatories Nos. 1 and 2, and with respect to the documents provided in accordance with Items No. 1 and 7 of plaintiffs' request for production of documents, that no central file of any plaintiffs, or any copy of its contents, and no personnel file of any member of the Adult Authority, hearing representative or executive officer, nor any copy of any of its contents, shall be shown to any person except counsel of record for the plaintiffs and no more than a total of two investigators designated by such counsel, and then only to the extent necessary to the conduct of this action.

And It Is Further Ordered that defandants' request for an in-camera inspection of the personnel files for a determination of the relevance and a

balancing of the materiality of their contents prior to release of the files to plaintiffs is denied.

And It Is Further Ordered that defendants comply with this order within 20 days of the date hereof.

And It Is Further Ordered that, pursuant to Rule 7, Federal Rules of Civil Procedure, Defendants pay to plaintiffs the sum of $500.00 as the expenses reasonably incurred by plaintiffs in obtaining this order.

And It Is Further Ordered that defendants' request for a stay of the requirement of disclosure of personnel records pending disposition of any petition for mandamus, filed by defendants within five days of the date hereof, to review this part of the order is denied.

Dated: June 20, 1974

Stanley A. Weigel
United States District Judge

In the United States District Court for the Northern District of California

No. C-72-2088 SAW

John Van Geldern, et al.,
Plaintiffs,
vs.
Henry W. Kerr, et al.,
Defendants.

[Filed Apr. 24, 1974]

FINDINGS AND RECOMMENDATIONS

The matter of plaintiff's motion for an order compelling defendants to produce documents and to answer or further answer interrogatories was the subject of a hearing April 1, 1974, and thereafter submitted on the papers in the file and arguments of counsel. The defendants opposed the motion on the ground that a large number of the document requests and interrogatories are irrelevant to the action, as in the defendants' view the subject matter of the complaint concerns only past correctional procedures limited to whether proceedings relating to the seven named plaintiffs regarding their parole comported to applicable standards of due process. This objection is not valid because it misconstrues the subject matter of the case. The complaint seeks relief more extensive than that envisioned by the defendants, and therefore the

defendants' objection to some of the plaintiffs' discovery on the ground of irrelevancy is without merit.

The defendants object to certain other parts of the plaintiffs' discovery requests claiming that the information sought is privileged absolutely under certain California State statutes. It is my view that objections on that ground also are without merit for reasons expressed in plaintiffs' memorandum in support of the motion, and should be overruled. Two other general objections made by the defendants that appear from time to time in their opposition to the plaintiffs' discovery requests, namely, that some create an undue burden upon the defendants; or, that the requests are not sufficiently detailed in that certain document requests are not specific enough should also be overruled.

I. DOCUMENTS

Having concluded that defendants' general objections mentioned above are not valid, it is recommended that with respect to plaintiffs' motion for production of documents the same be granted as to each and every item.

Where not specifically designated in any individual document request, it is recommended that the time period covered should be January 1, 1970, to the present. With respect to the documents referred to in Requests Nos. 1 and 7, a Protective Order should be entered, reciting that no central file of any plaintiff and no personnel file of any member of the Adult Authority, hearing representative, or executive officer shall be shown to any person except counsel for the

plaintiffs and those personnel employed in their offices, and then only to the extent necessary to the conduct of this litigation, except as may be permitted by further order of the Court.

II. INTERROGATORIES

It is recommended that plaintiffs' motion be granted as to Nos. 1 and 4; and denied as to Interrogatory 3 for each of eight defendant members of the Adult Authority. It it recommended that defendant Spangler answer Interrogatory No. 2.

It is further recommended that the plaintiffs' motion as to defendant Hoover be granted with respect to Interrogatories Nos. 12, 14, 16(b), 18, 20, 27, 31 and 38; and denied as to Nos. 15, 19 and 39.

Interrogatories Nos. 3 and 39 are covered by document requests, No. 19 requires no further answer, and No. 15 would require the Adult Authority Panel members to recall what the panel members said to the inmate and what the inmate said to them at diverse dates in 1972 and 1973 when the Adult Authority took action with respect to the named plaintiffs. That would be an undue burden upon the panel members. As to this particular interrogatory, the defense objection is well taken. Reference to plaintiffs' files and other documents as to which the motion is granted will suffice.

It is recommended that the plaintiffs' motion in respect to the Defendant Gordon be granted as to Interrogatories Nos. 14, 16, 17, 18, 27 and 41(b); and denied as to Nos. 15 and 39.

As to the Defendant Lynum, it is recommended that the motion be granted as to No. 27, and denied as to Nos. 39 and 41(b)39.

As to the Defendant Lopez, the motion should be granted as to Nos. 14, 27, 31, 34 and 35; and denied as to Nos. 38, 39, and 41(a)39.

As to the Defendant Edman, the motion should be granted as to Nos. 27 and 31; and denied as to Nos. 38, 39, 41(a)39, 41(c)9 and 41(d)39.

As to the Defendant Brown, the motion should be granted as to Nos. 14, 17, 27 and 41(d); and denied as to Nos. 19 and 39.

With respect to the Defendant Procunier, it is recommended that the motion be granted as to Nos. 12 and 14, and denied as to Nos. 10, 11 and 39.

As to the Defendant Spangler, it is recommended that the motion be granted as to Nos. 12, 14, 16, 17, 20, 21 through 38, and 41; and denied as to Nos. 10, 11, 13, 15 and 39.

Although Nos. 10 and 11 regarding Procunier and Spangler are relevant inquiries, it appears that plaintiffs will obtain the information through the granting of their motion for production of documents.

Finally, it is recommended that defendant pay to plaintiffs the sum of $500.00 as the expenses reasonably incurred by plaintiff in obtaining this order.

Dated: April 24, 1974

/s/ David R. Urdan
David R. Urdan
United States Magistrate

CERTIFICATE OF SERVICE BY MAIL

I Hereby Certify that copies of the foregoing Findings and Recommendations in Case No. C-72-2088SAW were this date mailed to the following:

B. E. Bergesen, III, Esq.
Attorney at Law
795 Turk Street
San Francisco, CA 94102

Fay Stender, Esq.
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Attorneys for Plaintiffs;

William D. Stein, Esq.
Deputy Attorney General
Office of the Attorney General
6000 State Building
San Francisco, CA 94102
Attorney for Defendants.

Dated: April 24, 1974.

/s/ David R. Urdan
David R. Urdan
United States Magistrate

Exhibit C

United States Court of Appeals
for the Ninth Circuit

No. 74-3392

Henry R. Kerr, et al., Petitioners,

vs.

United States District Court, Northern District of California, Respondent,

John Van Geldern, et al., Real Parties in Interest.

[Filed Dec. 18, 1974]

ORDER

Before: MERRILL and DUNIWAY, Circuit Judges

The petition for writ of mandamus or prohibition and application for stay of discovery order, filed on December 13, 1974, is denied. The stay ordered by Judge Duniway on December 13, 1974, is vacated.

/s/ Charles M. Merrill
/s/ Ben. C. Duniway
United States Circuit Judges

United States Court of Appeal
for the Ninth Circuit

No. 74-3392

Henry R. Kerr, et al.,
Petitioners,
vs.
United States District Court, Northern District of California,
Respondent,
John Van Geldern, et al.,
Real Parties in Interest.

[Filed Dec. 13, 1974]

ORDER

Before: DUNIWAY, Circuit Judge

The order of the district court made December 3, 1974 is hereby stayed pending further consideration of the pending petition for writ of mandamus.

/s/ Ben. C. Duniway
U. S. Circiut Judge

Exhibit D

In the United States District Court
Northern District of California

Civ. No. 72-2088 SAW

John Van Geldern, et al.,
Plaintiffs,
vs.
Henry W. Kerr, et al.,
Defendants.

[Filed Dec. 3, 1974]

ORDER

The plaintiffs have moved for enforcement of this Court's Order dated August 12, 1974, for sanctions and for clarification of said Order. Defendants have countermoved for sanctions and other relief.

The motions having duly come on for hearing, all parties having been heard, and good cause appearing therefor,

It Is Hereby Ordered that the Order of this Court dated August 12, 1974, is incorporated by reference into this Order.

It Is Hereby Ordered that the central files made available to plaintiffs in accordance with the Order dated August 12, 1974, shall include any and all mate-

rial, wherever located, which is available to or could be available upon request to Adult Authority members or hearing representatives in making parole determinations. The term "central files" shall include all files of a prisoner in the California Prison System, however designated, including but not limited to, "investigative files," "admininstrative files," or any similar designations. All such central files made available upon request by plaintiff shall be produced without any material, memos, documents, summaries, reports, letters or other papers of any kind, shape or form, having been removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection.

It Is Further Ordered that all material previously removed or withheld by defendants from files already requested by plaintiffs shall be made available to plaintiffs' counsel for inspection within ten days.

It Is Further Ordered that plaintiffs, in their inspection of central files, may be assisted by no more than two persons (other than plaintiffs' attorneys) who shall be supervised by plaintiffs' attorneys, and who shall be certified law students in good standing in California law schools, or members in good standing with the State Bar of California.

Such persons shall be permitted physically to inspect all of the files made available to plaintiffs' counsel under this Order and the Order dated August 12th, 1974.

It Is Further Ordered that inspection of central files shall take place under such conditions as to provide a reasonable opportunity for plaintiffs' counsel and their designated assistants, to carry out their inspection in a businesslike manner during normal working hours.

It Is Further Ordered that plaintiffs' counsel, including any assistants, shall not alter, add to or destroy any file or any part thereof.

It Is Further Ordered that the tape recordings of parole consideration hearings provided for by the Order of this Court dated August 12th, 1974, continue unobstructed, and that such recordings include any and all utterances of hearing officers or other prison officials present before, during and after the time the inmate enters the hearing room.

It Is Further Ordered in reference to the Order of this Court dated August 12th, 1974 that:

1. Defendants shall make available to plaintiffs, upon plaintiffs' request, the central file of any inmate within the California Prison System, whether or not hearings have been tape recorded for such inmate, up to a maximum of 200 such files. Files previously made available shall be counted toward the maximum.

2. Plaintiffs, at their sole expense, may photocopy any or all of the said 200 files and any part of any or all of such files, provided they obtain written permission to do so in advance, from each inmate subject of such files. Before giving permission to photocopy, each such inmate shall receive a written notice from plaintiffs describing, in reasonable detail, the identities and num-

bers of persons who may have access to the photocopies sought by plaintiffs and the plaintiffs' proposed eventual disposition of the photocopies.

3. Plaintiffs' attorneys shall not make any use of said photocopies nor permit inspection thereof, except as necessary for acquittal of their duties of representation in this case.

4. Plaintiffs' attorneys are charged with protecting the confidentiality of the contents of all the files or parts of files inspected and/or copied by them and/or their assistants.

It Is Further Ordered that those portions of the record in this proceeding which contain transcripts or partial transcripts of inmate hearings in which the identity of the subject inmate or any other inmate or former inmate is revealed shall be immediately sealed and such portions shall be open for inspection only by further order of this Court. The responsibility for effecting sealing is placed upon counsel for plaintiffs.

Dated: 12/3/74

/s/ Stanley A. Weigel
United States District Court Judge

In the United States District for
the Northern District of California

Civil No. C-72-2088 SAW

John Van Geldern, et al.,
Plaintiffs,

vs.

Henry W. Kerr, et al.,
Defendants.

[Filed Aug. 12, 1974]

ORDER

This Motion on July 18, 1974, came on to be heard on both plaintiffs' and defendants' request for review of Magistrate's Findings and Recommendations of June 11, 1974. Having heard argument by counsel for all parties and having considered all the records and files in this case,

It Is Ordered that the Magistrate's Findings and Recommendations dated June 11, 1974, and consisting of seven pages is incorporated by reference into this Order.

All counsel have agreed that the issue concerning attorney attendance at Adult Authority hearings has been resolved by mutual agreement of the parties and that it is therefore unnecessary for the Court to rule on this question.

It Is Further Ordered that the Findings and Recommendations of June 11, 1974, of the Magistrate are affirmed in part and overruled in part as specified in the remaining paragraphs of this Order.

It Is Further Ordered that the recommendation of the Magistrate concerning tape recording of Adult Authority hearings is overruled. California Adult Authority Parole Grant or Denial Hearings at both San Quentin and California Medical Facility located at Vacaville (hereinafter "Vacaville"), whether conducted by Adult Authority members of Hearing Representatives, shall be recorded, except as hereinafter provided, in their entirety pending further order of this Court. Said recording shall commence for all hearings taking place on or after August 5, 1974, and shall terminate two weeks prior to the date set for commencement of trial of this cause. Defendants shall promptly notify plaintiffs' counsel of the time and place of all scheduled parole grant or denial hearings at San Quentin and Vacaville from August 5, 1974, until two weeks prior to trial. Plaintiff's counsel shall then furnish to defendants' counsel, at least two days prior to the commencement of any hearing to be recorded, all necessary machinery to accomplish the tape recordings. The plaintiffs' counsel shall also furnish to defendants' counsel all necessary cassettes or tapes to comply with this Order. Plaintiffs shall be responsible for operating said tape recorder and shall see to it that all aspects of hearings are recorded, including all deliberations and conversations between and among panel members relating to the hearings even when prisoners are not physically present at the hearings.

Defendants shall cooperate to enable plaintiffs to comply with their obligations under this Order.

It Is Further Ordered that no party or other person shall alter, delete or destroy any tape, or any part thereof. Plaintiffs' counsel shall be responsible for assuring that defendants' counsel have equal access to any tapes within the possession or control of plaintiffs' counsel. Access to said tapes shall be restricted to counsel and their assistants and consultants.

It Is Further Ordered that prisoners who are participating in hearings shall have the option not to have their hearing recorded and they shall be advised of such right by supplying to them, prior to their hearing, a written notice in the form of Exhibit "A" to this order, which is hereby incorporated by reference.

It Is Further Ordered that with respect to the requested inspection of inmate central files the Magistrate's Findings and Recommendations are affirmed and modified as follows:

(a) Such inspection shall be carried out by plaintiffs' counsel and not by law students.

(b) Plaintiffs' counsel shall be permitted to select for their inspection the central files of those inmates whose hearings have been tape recorded in accordance with this Court Order (up to a maximum of 200 such files) and who have not objected to such inspection.

(c) For purposes of this Order the term "central files" shall be deemed to mean all of those files, wherever located, pertaining to an

inmate which are normally available to and considered by panel members and those actually used by panel members making a parole granting or denial determination.

(d) Defendants shall make such files available to plaintiffs' counsel during normal business hours at the offices of the Adult Authority at the Ferry Building in San Francisco.

It Is Further Ordered that defendants shall not be required to pay to plaintiffs attorneys fees or other expenses incurred in obtaining this Order.

Dated: Aug. 12th, 1971

/s/ Stanley A. Weigel
Judge, United States District Court

NOTICE OF RECORDING OF HEARING
AND NOTICE OF INSPECTING OF FILE

1. *Recording of Hearing*

A United States District Court Order requires that parole consideration hearings at San Quentin and Vacaville be tape recorded, but provides that any inmate may object to his hearing being recorded, and provides that the hearing may not be recorded if such an objection is made.

If your hearing is recorded, the attorneys for plaintiffs in the case may wish to inspect your central file. The plaintiffs are California state prisoners in prison and on parole. The defendants are the Directors of Corrections and the Adult Authority.

If you do not object, a tape recording will be made of your hearing and will be available to the attorneys

for both sides and to the Judge in a civil rights case. The recordings may be used as evidence to inform the federal judge of what happens at California parole consideration hearings.

If you do object, your hearing will not be recorded.

You should indicate by writing your initials in one of the boxes below whether you object, or do not object to your hearing being recorded.

☐ I *do not object* to my hearing being tape recorded.

☐ I *object* to my hearing being tape recorded.

Date: .....

.....
Inmate

2. *Inspection of Your File*

You should indicate whether you consent or do not consent by writing your initials in one of the boxes below.

☐ I *do consent* to plaintiffs' attorneys inspecting my central file.

☐ I *do not consent* to plaintiffs' attorneys inspecting my central file.

.....
Inmate

[This form should be given without comment by custodial officers or other personnel to each prisoner at San Quentin and Vacaville who will have a parole hearing between August 5, 1974, and November 15, 1974.]

In the United States District Court
for the Northern District of California

No. C-72-2088 SAW

John Van Geldern, et al., Plaintiffs,

vs.

Henry W. Kerr, et al., Defendants.

[Filed Jun 11, 1974]

FINDINGS AND RECOMMENDATIONS

The Plaintiffs' Motion for an Order Compelling Discovery pursuant to Rule 37, Federal Rules of Civil Procedure, was heard June 5, 1974, and was submitted after hearing argument of counsel and upon all files and records in the case. The plaintiffs seek three items in their motion: first, that members in good standing of the California Bar be allowed to attend Adult Authority parole granting hearings on 24-hours notice; second, that defendants tape record all Adult Authority parole granting hearings until trial commences in this case; and third, that plaintiffs' counsel be permitted to inspect at random every twentieth file of inmates confined in the California prison system, and for whom a central file is kept. The plaintiffs have previously served upon the defendants a written request for these three items, and the defendants have denied each request in writing.

The constitutionality of the decision-making process of the Adult Authority with respect to fixing of sentence or the granting of parole is the basic issue in the case. Since the plaintiffs allege that the proceedings of the Adult Authority leading to a determination as to whether inmates in the California prison system are to be confined or released do not meet due process requirements, it is critical to aid the Court in making a determination as to the constitutionality of the procedures that the plaintiffs be permitted to develop facts and information through the federal rules discovery process, as to what transpires at such a hearing, and also to examine the central files of inmates other than the named plaintiffs.

I. *Attending Adult Authority Hearings*

The Adult Authority issued Policy Statement No. 3 (Statement) April 24, 1967, which sets forth the rules to be followed at Adult Authority hearings. In pertinent part the Statement provides that certain persons might be invited to the hearings as official guests including, for example, legislators, judges, law enforcement officials, members of the press, but the Statement does not include members of the Bar or attorneys for the inmates. Invited guests are not permitted to take notes, no more than three visitors may observe any hearing, no person may appear in opposition to or as an advocate for any particular inmate,

no one may visit a parole hearing case who may have a personal interest in the inmate, no visitors are permitted where the inmate objects, and care is taken not to schedule visitors on the last day of the hearings. The Classification and Parole Representative at each institution is responsible for scheduling visitors at Adult Authority hearings.

Two things appear evident: first, the defendants completely control access to Adult Authority hearings that are the subject matter of the litigation; second, the procedure followed at these hearings is relevant and material to the subject matter of the case. The Federal Courts have allowed discovery by means of observation and have ordered the production of tape recordings and transcripts in certain cases. (See citations in Plaintiffs' Memorandum in Support of Motion.) Although the defendants seem to be willing, as expressed at the hearing and in their opposition papers, to reach an accommodation on this issue, they nevertheless argue that the issue of whether attorneys shall be allowed to observe Adult Authority hearings requires a determination by a three-judge Court that certain of the provisions in the Statement are invalid and inoperable.

The Statement cannot prevent relevant discovery under the Federal Rules of Civil Procedure and defendants' notion that a three-judge Court is required to rule on the question of whether plaintiffs should be permitted to attend the hearings in face of the Statement is without merit. The Statement is not a state statute or an order made by an administrative

board acting under a state statute within the meaning of 28 U.S.C. 2281 so as to require a three-judge Federal Court to pass upon its force and effect in this case.

The defendants argue further that many other avenues of discovery are open to the plaintiffs without the necessity of permitting counsel for plaintiffs to attend the hearings; for example, deposing Adult Authority members; deposing or calling inmates who have appeared at the hearings as witnesses; and inquiring of the defendants as to Adult Authority hearing procedures by means of interrogatories. The question, however, so far as plaintiffs' motion is concerned, and so far as the right to undertake discovery in general is concerned, is not what is necessary but what is permitted under the rules. What goes on at the hearings is relevant to the subject of the litigation, and once relevance is established the federal civil discovery rules are to be liberally construed. Parties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action, and may undertake to seek information reasonably calculated to lead to the discovery of admissible evidence, and, parties may obtain discovery by permission to enter upon land or other property for inspection and or other purposes. Rule 26(a), Federal Rules of Civil Procedure. Also, the Court can make any order which justice requires to protect a party or person, including that the discovery may be had only on specified terms and conditions. Rule 26(c), Federal Rules of Civil Procedure. It is my

view that those two provisions of Rule 26 should be jointly applied to allow members of the Bar to attend Adult Authority hearings. In balancing the degree of necessity for disclosure shown by the private litigants here against the State's claim of importance of maintaining the "secrecy" of the hearings as expressed in the Statement, it is my view that plaintiffs' position is more compelling.

I do not believe plaintiffs' motion on this item should be granted in the form requested, but would recommend it be granted as follows:

The discovery cut-off date in the case is now set at August 15, 1974. The defendants' attorneys should arrange with the Classification and Parole Representative (the person listed in the Statement as being responsible for scheduling visitors at Adult Authority hearings) for three members of the California Bar to attend at least 15 Adult Authority hearings between now and August 15, 1974; that counsel for plaintiffs be included with respect to at least one-half of the visits so scheduled and that these attorney visitors be allowed to take hand-written notes of the proceedings.

II. *Tape Recording*

It is my recommendation that this portion of the plaintiffs' motion be denied. The mechanics of tape recording and the intrusion of such a system upon the need for preserving the unfettered conduct of the hearings and free expression by inmates and Adult Authority members outweighs the utility and necessity of providing plaintiffs with this discovery vehicle. Furthermore, attendance at hearings provided in Part I of these Findings is a fair substitute for recording as well as providing plaintiff with access to the hearings.

III. *Inmates' Files*

Plaintiffs seek to have defendant produce every twentieth file of inmates in California prisons. This would amount to about 1,000 files.

The files of the seven-named plaintiffs have been produced. Defendants object to producing files of inmates other than named plaintiffs. They argue that no decided California case requires it; that to do so would violate confidentiality provisions of California statutes and further, that such disclosure would, perhaps, be detrimental to institutional security, reveal informants who have a right to be protected and would inhibit public officials and private individuals from coming forth with information concerning inmates.

In cases arising under federal law it is clear that there is no constitutional inhibition to abrogation of state-created privileges in connection with pre-trial discovery. There is no absolute California State privilege that would prevent pre-trial discovery of inmate files. And further, there is no specific federal statute dealing with evidentiary privileges applicable to this case. The standard to be applied is not state case law or state statutes, but whether the confidentiality of files outweighs the plaintiffs' right to acquire material

relevant to the case. The answer is to grant discovery within the confines of a protective order contemplated by the rules.

There is the concept that the public interest may be a reason for not permitting inquiry into particular matters by discovery. However, in this case that interest is less critical that plaintiffs' right to utilize the discovery process, under certain limits, to examine inmate files where the contents are or may be central to the allegations made; namely, that the Adult Authority decision to release or confine an inmate is based in whole or in part on the information contained therein.

From all that appears in the files of this case and from all I have heard at discovery motion hearings, the conduct of the Adult Authority hearings and the manner in which they are held together with information in inmate files are, perhaps, the most relevant matters that might tend to support the plaintiffs' claims, are directly relevant and material to the subject of the litigation and are discoverable.

I would recommend that this item of the plaintiffs' motion be granted. However, the number of files to be produced should be limited to 200 and produced within 20 days subject to a protective order that would restrict examination and inspection of inmate files to attorneys for plaintiffs and for their use only in connection with this lawsuit.

Plaintiffs also seek $950 as sanctions against defendants for bringing this motion. I would deny plaintiffs that amount or any other sums. These requests here,

as distinguished from other previous motions, are rather unique. Defendants' failure to comply with plaintiffs' original requests for this information was not unreasonable as to now award plaintiffs any attorneys' fees.

Dated: June 11, 1974.

/s/ David R. Urdan
David R. Urdan
United States Magistrate

CERTIFICATE OF SERVICE BY MAIL

I Hereby Certify that copies of the foregoing Findings and Recommendations in Case No. C-72-2088 SAW were this date mailed to the following:

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Dated: June 11, 1974.

/s/ David R. Urdan
David R. Urdan
United States Magistrate